# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1368

HAROLD KONIGSBERG, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. D) is reported at 418 F. 2d 1270. The opinion on direct review is reported at 336 F. 2d 844, certiorari denied, 379 U.S. 933.

### JURISDICTION

The judgment of the court of appeals was entered on November 28, 1969. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to March 28, 1970. The petition, filed on March 30, 1970, is out of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



383-630—70

## QUESTION PRESENTED

Whether the district court committed error in denying without an evidentiary hearing petitioner's motion pursuant to 28 U.S.C. 2255 to vacate his sentence as having been imposed in violation of his Fourth, Fifth, and Sixth Amendment rights.

## STATEMENT

In 1963, petitioner and several co-defendants were convicted in the United States District Court for the District of New Jersey of possessing goods, constituting part of an interstate shipment, valued in excess of $100 with knowledge the goods were stolen, in violation of 18 U.S.C. 659. Petitioner was sentenced to imprisonment for ten years. On appeal, the conviction was affirmed, 336 F. 2d 844, and this Court denied certiorari, 379 U.S. 933. Petitioner subsequently moved the district court pursuant to 28 U.S.C. 2255 to vacate his sentence, which motion was denied without a hearing (Pet. App. B). On appeal, the court of appeals affirmed, 418 F. 2d 1270 (Pet. App. D).

The evidence is set forth at length in the opinion of the court of appeals affirming petitioner's conviction (336 F. 2d 844). In pertinent part, it revealed that in December, 1961, an interstate shipment of more than 3,000 men's suits had been hijacked in Parksville, New York. Some time prior to January 10, 1962, an unnamed informant telephoned an FBI agent that "an apparently unlimited quantity of Bond suits" was being disposed of in the vicinity of the Hoo-Ha Bar, located in Bayonne, New Jersey. The informant, who had given FBI agents reliable infor-

mation in the past leading to the solution of crimes, recited specific manufacturers' label numbers on some of the garments. These numbers were checked and identified by the manufacturers as being among those included in the hijacked shipment.

Acting on the informant's corroborated information and on knowledge that the Hoo-Ha Bar was operated and patronized by persons having prior criminal records, FBI agents began a surveillance of the area. At about 8:20 p.m. on the evening of January 10, 1962, an automobile was seen by FBI agent Straub entering a garage located across the street from the Hoo-Ha Bar and, shortly thereafter, being driven out of the garage and parked nearby. After the driver left the car and entered the bar, agent Straub walked past the automobile and saw, with the aid of street lights, several suits with white tags lying on the back seat. This same back seat had been empty when observed in similar fashion by an FBI agent shortly before the car was driven into the garage. The next day the agents obtained a warrant to search the garage.

On resuming their surveillance during the evening of January 11, 1962, the agents observed several men, including the driver of the car seen the previous night, back a station wagon into the garage and then enter the garage and close the doors. An hour or so later, as the occupants began to raise the garage doors, the FBI agents, having stationed themselves in front of the garage, observed, with the aid of street lights and flash lights, piles of suits on the floor inside. The agents identified themselves as FBI men and announced that everyone then in the garage (which in-

cluded petitioner) was under arrest. The search warrant was not executed; however, the clothing inside the garage was seized.

Petitioner and the others were advised of their rights to remain silent and be represented by counsel. They were driven in several ordinary passenger cars to the FBI office in Newark. After being fingerprinted and photographed, petitioner, who had $11,000 on his person, meticulously counted the money with agent Straub. He was then asked if he desired to explain his presence in the garage. Petitioner replied this was the only legitimate arrest the FBI ever made of him; there was one thing he didn't have, and that was stool pigeons, and his purpose in being in the garage was "to help a fellow out."

## ARGUMENT

As noted, the petition for a writ of certiorari is out of time. Even if petitioner had filed within the period prescribed, however, the issue presented would not have warranted further review by this Court. The right to an evidentiary hearing on a Section 2255 motion collaterally attacking sentence is not absolute. The statute imposes upon the sentencing court an affirmative duty to look into the files and records of the case in light of the pending motion and grant a hearing if such examination *fails* to demonstrate conclusively that the movant is entitled to no relief. See *Brisco* v. *United States*, 368 F.2d 214 (C.A. 3). Petitioner does not here assert the district court failed to make a thorough examination of the files and records of the case, but rather, conceding that point (Pet.

6-7), quarrels with the court's conclusion after proper examination—"* * * under § 2255 there is no need for a hearing on any of the grounds raised by petitioner" (Pet. 14a–15a)—and with the per curiam affirmance of that conclusion in the court of appeals. The three grounds which serve as a predicate for petitioner's 2255 motion present no legal basis for granting the relief sought.

1. Petitioner first asserts that testimony of FBI agent Straub in a post-conviction hearing held in the New York County Supreme Court (Pet. 18a–19a) conflicts with agent Straub's testimony at trial and has a direct bearing on the admissibility of petitioner's incriminating statements introduced into evidence. In substance, the new testimony shows that petitioner's statements were made some time after he expressed to agent Straub a desire to telephone his counsel but before he actually placed the call. As the courts below noted, this testimony did not conflict with any evidence adduced at trial nor change the conclusion that the statements were freely and voluntarily given.[1] (Pet. 12a, 20a–21a).

[1] The trial court's ruling on voluntariness is set forth in the opinion of the court of appeals as follows (336 F. 2d at 852):

> As I stated before, I find from the testimony I have heard that the statements made by the defendant Harold Konigsberg when he was in custody were not involuntary statements but on the contrary that they were made voluntarily by him and he had been advised of his rights to counsel and of the fact that anything he might state could be used against him. He was, as I find from the testimony, warned before he made any state-

The admissibility of petitioner's statements to agents Straub and Roetzel received thorough consideration on direct review. The court below at that time found, and petitioner does not now deny, that prior to making the statements petitioner had been fully advised of his constitutional rights; that evidence of numerous earlier arrests and a prior conviction for robbery demonstrated petitioner was no innocent novice whose will could easily have been overcome by police psychology; that petitioner had at no time been subjected to grueling inquiry focussed upon him alone for the purpose of extracting a confession; that the statements were elicited during casual conversation incidental to administrative tasks of fingerprinting and photographing; and that the nature of the statements fell far short of a confession and indeed were only potentially incriminating admissions. In these respects petitioner's case was properly distinguished from *Escobedo* v. *Illinois,* 378 U.S. 478, and his statements were held to have been voluntary and admissible.

Petitioner now argues, however, that had the court of appeals been aware of the later-testimony at the time it affirmed the 1963 conviction, it would have

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ments that he was not required to make statements, that any statements he did make could be used against him.

He was likewise advised of his right to counsel.

There is no evidence of any intimidation, no evidence, circumstantial or otherwise, that he was under duress or that any hope of reward or promise of leniency were held out to him to induce statements.

He might well have chosen to refuse to say anything. He chose to make comments, and the text of them would indicate the voluntary nature.

been compelled by *Escobedo* v. *Illinois, supra,* to exclude the incriminating statements as involuntary in light of the "totality of circumstances" (Pet. 12). He premises this argument on the assertion that *Escobedo* can here be read in light of the subsequent decision of this Court in *Miranda* v. *Arizona,* 384 U.S. 436, 444-445, which precludes questioning of an individual in custody who makes known a desire first to consult counsel, notwithstanding this Court's determination in *Johnson* v. *New Jersey,* 384 U.S. 719, that *Miranda* shall not be applied retroactively (Pet. 16). Both courts below flatly rejected this latter proposition (Pet. 8a–9a, 20a). In addition, they concluded that the testimony given at the New York hearing did not contain "any substantive discrepancies" (Pet. 20a) from the trial testimony of the agents scrutinized on direct appeal. Accordingly, this ground serves no basis for collateral relief.

2. Petitioner next contends the courts below erred in denying him standing to contest the legality of a search and seizure which occurred during arrest and he relies on the recent decision of this Court in *Kaufman* v. *United States,* 394 U.S. 217, to raise the Fourth Amendment question in his Section 2255 motion. This argument overlooks the fact that the legality of the search of the garage and seizure of the clothing therein was fully litigated on petitioner's motion to suppress at trial and on direct appeal (see the government's briefs in opposition in *Konigsberg* v. *United States,* O.T. 1964, No. 596, and in the companion case, *Celso* v. *United States,* O.T. 1964, No. 492), and, in both

instances, the courts below decided against petitioner on the issue of standing *and alternatively,* on the issue of probable cause for arrest at the time of the search and seizure.

In addition, in opposing petitioner's 1964 petition for a writ of certiorari seeking review by this Court of the decisions below, the government chose not to rely upon the argument that petitioner lacked standing as justification for the admissibility of the evidence, but based its argument solely upon the alternative finding of the lower courts that, in all events, the search was incident to a lawful arrest. Accordingly, even if it is assumed petitioner may raise his Fourth Amendment question on collateral attack (*Sanders* v. *United States,* 373 U.S. 1, cf. *Kaufman* v. *United States, supra*), it is clear he is here entitled to no relief absent some showing of error in the findings relating to probable cause. There is nothing in petitioner's argument on the search and seizure question (Pet. 19–25), however, to indicate the existence of such error, except perhaps, his passing reference to this Court's recent decision in *Spinelli* v. *United States,* 393 U.S. 410 (Pet. 22–23). To the extent this case has any application to the earlier findings of probable cause by the trial court and the court of appeals (after full consideration of the merits), it is clear that even a reading of *Spinelli, supra,* most favorable to petitioner would not warrant relief nor justify a hearing on petitioner's 2255 motion.

3. Finally, petitioner argues that because the jury was present during a portion of the hearing on the issue of the voluntariness of his incriminating state-

ments, he was deprived of due process of law, citing *Jackson* v. *Denno,* 378 U.S. 368. Collateral attack of the sentence on this ground is warranted only if petitioner can demonstrate that the trial court and the court of appeals erred in deciding that the incriminating statements did not fall within the purview of the *Escobedo* decision. As already pointed out, both courts below found the testimony of agent Straub in the New York post-conviction hearing singularly unpersuasive in this regard. Since that testimony was insufficient, after thorough examination of the files and records of the case, to raise even a mere suggestion that the incriminating statements were anything other than voluntary, petitioner's argument that he was deprived of due process of law under *Jackson* v. *Denno, supra,* is totally without merit.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

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